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CHARLES ELMORE

No. 268

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE SUGAR INSTITUTE, INC., ET AL., APELLANTS

v.

UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI

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Now comes the United States, appellee in the above-entitled appeal, by its counsel, and suggests to this Court that there has been a diminution of the record herein, and respectfully moves that this Court issue a writ of certiorari directed to the District Court of the United States for the Southern District of New York, commanding that court to certify and send to this Court the narrative statements and exhibits contained in the Appendix annexed to this motion.[1]

[1]For the convenience of the Court there is also included in the Appendix the Government's Praecipe and Supplemental Praecipe, and the stipulations, orders and clerk's certificates relating thereto.

Said narrative statements and exhibits have been duly certified to be correct by the District Court and by the Clerk thereof. Said certifications are now on file with the Clerk of the Supreme Court.

Said narrative statements and exhibits relate to four subjects which appellee deems material to the appeal, namely, (1) a system of fines and penalties, which appellants endeavored to impose upon members of the Sugar Institute, to enforce the various restraints enjoined by the District Court, (2) blacklisting of sugar distributors, (3) attempted bribes by the chief investigator of the Sugar Institute to obtain evidence from a sugar distributor and from a warehouseman regarding violations of the Sugar Institute's rules, and (4) allocation of territory.

Said narrative statements and exhibits were excluded from the record on appeal by the District Court on the ground that they were not essential to the decision of the questions presented by the appeal. Appellee's reasons for believing this evidence material are hereafter set forth.

The final decree in this case enjoins 48 defendants, including the Sugar Institute (a trade association representing virtually the entire American cane sugar refining industry) and the 15 sugar refining companies holding membership therein, from further conspiring to restrain trade in violation of the Sherman Antitrust Act, and specifically

from engaging in restraints relating to the following subjects:

1. Future price reporting involving agreements not to deviate from previously reported prices and terms.
2. Restrictions on repricing of contracts.
3. Interchanging statistics regarding melt, sales, deliveries, stocks, shipments, etc., without making such statistics available to purchasers.
4. Restrictions upon freight charges.
5. Boycotting brokers, warehouses, customers, carriers, or trucking companies.
6. Exacting pledges from brokers.
7. Exacting uniform agreements from warehouses or trucking companies.
8. Fixing brokerage commissions.
9. Agreements on a system of "delivered prices" or basing points, or refusing to sell f. o. b. refinery.
10. Circulating freight books relating to current or future freight charges or selling terms.
11. Restrictions on transiting or diversion of shipments.
12. Requiring water carriers to conform to a plan of announcing rates or terms in advance.
13. Restrictions upon the making of private charters.
14. Restrictions upon pool-car and pool-cargo shipments.

15. Fixing switching charges.
16. Fixing service charges or extra charges.
17. Restraints upon consignment points.
18. Restraints upon long-term contracts.
19. Restraints upon quantity discounts.
20. Restraints upon tolling contracts.
21. Restraints upon split billing or other credit terms.
22. Restraints upon price guarantees.
23. Elimination of allowances on used bags or customers' bags.
24. Elimination of private brands.
25. Restraints upon resales or sales of second-hand sugar.
26. Restraints upon the sale of damaged sugar or frozen stocks.
27. Exacting agreements from distributors to maintain prices.
28. Policing activities in aid of above restraints.

1. Evidence regarding fines and penalties

The narrative statements and exhibits relating to fines and penalties contain evidence that in June 1930 the Sugar Institute adopted a resolution embodying a system whereby members might be punished for violations of the Institute's rules by fines not exceeding $1,000 plus 10% of the amount of sugar involved in such transactions, by expulsion or suspension, by discipline or discharge of employes, and by disqualification and consequent boy-

cotting of brokers; that members of the Institute had considered a system of fines and penalties for approximately one year and a half prior to the adoption thereof; that one member protested against the resolution on the ground that it was illegal, but later indicated that it would "cooperate" with the Institute; that another member was specifically excepted from the resolution; that certain members notified their brokers by registered and circular letters that the system of fines and penalties had been imposed; that several members warned their brokers and employes that they would be called upon to pay any fines caused by them; that the Executive Secretary of the Institute advised an inquiring member that the fines and penalties section "is operative and the Executive Committee may at any time exercise its authority under the provisions of the Code ruling"; and that the resolution was rescinded January 29, 1931 (two months prior to the filing of this suit).

The District Court found that the resolution embodying a system of fines was adopted in June 1930, that most of the refiners assented to the plan, that the Institute officials as well as some refiners deemed it operative, that two of the refiners did not assent thereto, that some of them believed that it never became operative, that apparently no fines were ever imposed, that in January 1931 the resolution was formally rescinded, that there was genuine confusion on the part of defendants as to this

matter, and that the system was abortive and of no importance.

It appears that the District Court excluded the evidence regarding fines and penalties from the record on appeal on the ground that the Government had not taken a cross-appeal from the adverse finding of the court, and that the evidence was not material to any question raised by defendants' appeal.

Appellee submits that the evidence is material to the appeal even though the Government did not take a cross-appeal. Defendants have appealed from a final decree which enjoins a large number of restraints found to be unreasonable and illegal. In several cases involving restraint of trade this Court appears to have regarded the fact that the restraints were enforcible by a system of fines and penalties as an added indication of illegality. *United States* v. *American Linseed Co., et al.,* 262 U. S. 371, 382, 389; *Maple Flooring Mfr's Assoc. et al.* v. *United States,* 268 U. S. 563, 576–577, 581. See also *United States* v. *First National Pictures, Inc.,* 282 U. S. 44. Whether the evidence in this case be regarded as establishing that a system of fines and penalties was put into effect for a certain period of time or as establishing merely an abortive attempt to put such a system into effect, it would seem material to the issues on appeal. At the very least, the evidence shows a concerted effort to make use of this particular type of coercion to enforce

compliance with restraints which the District Court found to be illegal.

The evidence also is material to the provision of the final decree enjoining defendants from subjecting brokers, warehousemen, and customers of the refiners to any "fine or penalty, as part of or in aid of any program enjoined by this decree."

In an equity proceeding under the Sherman Antitrust Act the Court should have before it the essential facts which were before the District Court, even though the District Court did not rely on certain of those facts in reaching its conclusion that defendants were engaged in a conspiracy unreasonably to restrain trade and commerce.

2. Evidence regarding blacklisting of sugar distributors

The narrative statements and exhibits regarding blacklisting of sugar distributors contain evidence that several of the appellant refiners had an understanding whereby they would refuse to sell sugar to any purchaser reported by another member of the Institute as having been stricken from that member's list of customers because the customer had canceled or repudiated a contract; that appellant Place wrote a series of memoranda in which he stated that it was the understanding of certain refiners "that no name circulated is to be sold by other members—at least not without discussing the subject openly"; that Place testified that he had falsified in these memoranda in order to deceive his own employees; and that certain refiners sold to

purchasers after they had been reported by other refiners.

The District Court stated in its opinion that these memoranda tended to show that appellant Place (Vice President of appellant W. J. McCahan Sugar Refining & Molasses Co.), appellant Abbott (General Counsel and later President of appellant The American Sugar Refining Company), appellant Hoodless (Vice President of appellant Pennsylvania Sugar Co.), and others had an understanding that a customer reported as stricken from the list of one refiner should not "be sold by other refiners—at least not without discussing the subject openly." The opinion stated further that Place's explanation of the documents (that he was misrepresenting the true facts in order to induce his subordinates to feel bound to cease selling a particular customer whom Place personally wished to cut off) could not be accepted. The court concluded, however, that the evidence was too inconclusive to establish a general agreement of the character indicated by Place's memoranda.

It appears that the District Court excluded this evidence from the record on appeal on the ground that the Government had not taken a cross-appeal from the court's adverse finding, and that the evidence was not material to any question raised by defendants' appeal.

Appellee submits that the evidence is material to the appeal even though the Government did not

take a cross appeal. Most of the excluded exhibits relating to blacklisting of distributors also relate to the Institute's enforcement of contract terms. The final decree enjoins various activities concerning the enforcement of contract terms. For example, it enjoins defendants from engaging in any program of "determining whether or not [or] to what extent to relax or change contract terms, or using statistics of unspecified or undelivered contract balances as a part or in aid of such conduct." The excluded exhibits also have a material bearing on the provisions of the decree enjoining appellants from "refusing or threatening to refuse to deal with any broker, warehouse, customer, trucking concern, carrier or any combination thereof as part of or in aid of any program enjoined by this decree", and from restricting any refiner in his freedom to make special contract terms with purchasers or to waive particular terms of contracts already entered into.

The evidence excluded relates to a particularly obnoxious type of coercion apparently employed by certain refiners to bring about compliance with various restraints imposed by appellants' combination.

Furthermore, Place, who was one of appellants' principal witnesses, denied material facts which certain Government exhibits tended to establish. His testimony regarding the blacklisting of customers may have a material bearing upon the

weight which the Court will give to his other testimony.

3. Evidence regarding attempted bribes by Institute investigator

The narrative statements and exhibits regarding attempted bribes on the part of an Institute investigator contain evidence tending to show that Chinal, chief investigator of the Institute, offered a large bribe to a Detroit warehouseman to obtain evidence of violations of the Institute's rules on the part of a large sugar distributor whom the Institute had sought to enlist in its program of price maintenance, and that Chinal endeavored to bribe an employee of that distributor at Indianapolis in order to obtain similar evidence.

It appears that the District Court excluded this evidence from the record on appeal on the ground that the Government had not sustained the burden of proof regarding the alleged attempt to bribe the distributor's employe.

The evidence is directly related to the Institute's system of investigations, as to which the District Court said in its opinion:

> A further charge of illegal conduct is that the Institute from time to time examined the several refiners' records, files, etc., in investigating suspected code violations and that more or less formal trials of refiners were held in order to determine whether there had been code violations. These activities, insofar as they were in aid of defendants' other

> illegal activities, must be held likewise illegal.

Appellee submits that this evidence as to the enforcement activities of the Institute, or of its agent, has a material bearing upon the reasonableness of the restraints enjoined by the final decree.

4. Evidence regarding allocation of territory

Exhibits 446 to 446–f, excluded from the record on appeal, contain evidence that appellant Western Sugar Refinery withdrew its sales campaign in four States "in deference to the desires of our eastern friends", after Eastern refiners had complained of its competition in those States.

This evidence was used in the trial court partially in support of the Government's contention that defendants had attempted to allocate production and territory. Regarding this the opinion of the District Court concluded that

> The evidence shows at most only that (1) defendants considered allocation of production and collected and exchanged statistics serviceable as a basis therefor; (2) other activities resulted incidentally in limiting sales territories of some defendants in certain isolated instances; there may, too, have been some concerted effort in one case, to induce Western to withdraw from Indiana, Ohio, Kentucky, and Tennessee.

and that

> There is no evidence that defendants gave any consideration to a general territorial allocation.

Even though the final decree does not enjoin allocation of territory, the evidence is material, together with other evidence, in showing the extent to which the defendants' activities through the Institute resulted in understandings not to compete with each other.

WHEREFORE, the United States prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the District Court of the United States for the Southern District of New York, commanding that court to certify and send to this Court the additional transcript of record contained in the Appendix annexed to this motion.

STANLEY REED,
Solicitor General.
ANGUS D. MACLEAN,
Assistant Attorney General.
WALTER L. RICE,
Special Assistant to the Attorney General.

September 1935.

DISTRICT OF COLUMBIA, *ss:*

Walter L. Rice, being duly sworn, deposes and says:

I am a Special Assistant to the Attorney General, and have been actively engaged in the trial and preparation of the appeal of the above-entitled case. I have read the foregoing motion and know the contents thereof and I am informed and verily

believe that the statements of fact therein are true. My information and belief are based upon an examination of the testimony, exhibits, opinion, final decree, and other documents comprising the record in this case.

WALTER L. RICE.

Subscribed and sworn to before me this 17th day of September 1935.

DOROTHY JOST,
Notary.

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